

ENRON OIL AND GAS CO.

IBLA 97-217

Decided April 24, 2000

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting a noncompetitive acquired lands presale oil and gas lease offer. CACA 37439.

Affirmed, case file remanded to BLM for further proceedings.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Lands Subject to

Land included within an outstanding oil and gas lease, whether void, voidable, or valid, is not available for leasing, and an application for such land must be rejected.

APPEARANCES: Carleton L. Ekberg, Esq., Poulson, Odell & Peterson, LLC, Denver, Colorado, for Appellant; John R. Payne, Esq., Office of the Regional Solicitor, Pacific Southwest Region, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Enron Oil and Gas Company (Enron or Appellant) has appealed from a January 8, 1997, decision (Decision) of the Chief, Branch of Energy and Mineral Science and Adjudication, California State Office, Bureau of Land Management (BLM), that rejected that portion of Enron's noncompetitive presale oil and gas lease offer CACA 37439 encompassing 22.39 acres in Contra Costa County, California, described by metes and bounds within sec. 28, T. 2 N., R. 3 E., Mount Diablo Meridian.

The January 8, 1997, Decision appealed from rejected the subject portion of the noncompetitive offer made by Appellant because the lands were currently subject to Oil and Gas Compensatory Royalty Agreement (CRA) CACA 36529 and were not available for leasing.

A brief chronology of events related to the area for which the lease is requested will prove helpful. By letter dated October 10, 1994, St. Croix Resources, Inc. (St. Croix), the predecessor-in-interest to Tonka Energy, Inc. (Tonka), sought a CRA or lease pursuant to 43 C.F.R. §§ 3109.1-4 and 1-5 (which relate to leasing under the Right-of-Way Leasing Act, 30 U.S.C. §§ 301-306 (1994)). See Exh. H to Statement of Reasons

(SOR). Recounting that it had conducted "extensive geological and geophysical studies" in the area (known as the Dutch Slough Unit), St. Croix noted that drilling would be imprudent with unleased "canal parcels" within the unit. Id. It sought a noncompetitive lease of 79.29 acres because, it said, "given the current nature of the BLM leasing program in California, it might take months or possibly years before the land could be posted to a competitive sale under the provisions of the Reform Act." Id. 1/ St. Croix further noted that 50.56 acres had been leased under FOGLRA in 1988 at a price of \$3 per acre, which lease terminated in 1989 for nonpayment of the annual rental. The remaining acreage had been held under a noncompetitive lease which had terminated in July 1979 and had not been offered for further leasing. Id. St. Croix offered \$50 per acre plus a 1/6th royalty.

On October 24, 1994, St. Croix amended its request by deleting 34.67 acres (located in secs. 19 and 30) so that its request covered a total 44.62 acres. Its request thus covered lands in secs. 28, 33, and 34. Id.

The case file for lease CACA 36529 reflects that in April 1996, BLM received notification that Tonka had assumed responsibility as operator from St. Croix for the Dutch Slough Gas Unit. On July 16, 1996, BLM signed a CRA with Tonka, effective June 3, 1996. See Exh. G to SOR. This CRA covered only the lands in sec. 28 and was expressly issued under the authority of the Act of May 21, 1930, 30 U.S.C. § 301-306 (1994), the Right-of-Way Leasing Act. Id.

On November 13, 1996, Enron filed a presale acquired lands lease offer for lands in secs. 28, 33, and 34. The lands in sec. 28 were the same lands already covered by CRA CACA 36529. In its decision dated January 8, 1997, BLM rejected the offer as to the lands in sec. 28 on the grounds that, since they were within CRA CACA 36529, they were unavailable for leasing. (Decision at 1.) Appellant timely appealed.

Thereafter, on July 31, 1997, while this appeal was pending before the Board, BLM, in response to a request filed by Tonka to delete certain acreage from the CRA to conform to "the producing unit" pooling declaration, deleted 11.29 acres from the agreement and, sua sponte, declared that "CACA 36529 is amended to reflect the new acreage and issued pursuant

1/ The Reform Act is the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOGLRA), as amended, 30 U.S.C. § 226 (1994). Under 30 U.S.C. § 226(b)(1)(A) (1994), Congress provided for oil and gas lease sales by competitive bidding and directed that "[t]he Secretary shall accept the highest bid from a responsible qualified bidder which is equal to or greater than the national minimum acceptable bid, without evaluation of the value of the lands proposed for bid."

to the Mineral Leasing Act for Acquired Lands of August 7, 1947, effective the date of this decision." ^{2/}

On November 28, 1998, we issued an order directing BLM to respond to Appellant's SOR and to submit the compensatory royalty file in CACA 36529. ^{3/}

Appellant, in its SOR, maintains that the lands in sec. 28 included in both Appellant's lease offer CACA 37439 and CRA CACA 36529 were acquired by the United States in fee by grant deed dated November 30, 1937, from the Bank of America National Trust and Savings Association. (SOR at 3-4.) Appellant argues that since these lands had been acquired by the United States in fee, they could not be leased under the Right-of-Way Leasing Act, but had to be leased under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1994). (SOR at 9-10.) Appellant thus claims the CRA was not properly issued and is invalid.

In its Answer, BLM states that it does not contest Enron's SOR with regard to the following:

- (1) The lands at issue were reacquired in 1937, and have had the status of "acquired lands" since that time.
- (2) The lands at issue do not fall within any of the exceptions to the Mineral Leasing Act for Acquired Lands.
- (3) The lands at issue do not contain any of the types of rights-of-way which would be relevant to the Right-of-Way Leasing Act.
- (4) The Right-of-Way Leasing Act was not the proper authority for issuance of CRA CACA 36529. Rather, the Mineral Leasing Act for Acquired Lands was and is the proper authority for issuance of CRA CACA 36529.

(Answer at 1-2.)

^{2/} On May 18, 1998, Enron's offer to lease for the remaining lands was rejected on the ground that, since the Bureau of Reclamation had refused to grant its consent to lease because it was in the process of transferring title of the canal to the Contra Costa Water District, the land was not available for leasing. The refusal to consent to lease was dated Dec. 9, 1996, prior to the effective date of the July 31, 1997, amendment of CACA 36529. This decision was apparently not appealed, even though it was clearly wrong under applicable precedents (see, e.g., Robert J. Shorney, 88 IBLA 61 (1985); Esdra K. Hartley, 35 IBLA 137 (1978)), although arguably in accord with an Interagency Agreement between BLM and the Bureau of Reclamation (see BLM Manual Handbook H-3101-1 at III.B.2).

^{3/} While BLM filed its Answer on Jan. 20, 1999, the case file in CACA 36529 was not provided to the Board until Mar. 6, 2000.

BLM also states in its Answer that on July 31, 1997, after this appeal was filed, it amended the prior decision to reflect that the lease offer was accepted under the Mineral Leasing Act for Acquired Lands, thus correcting the inappropriate basis under which the lease had previously been issued. (Answer at 2.) Moreover, BLM claims, the prohibition against changing the status quo of a case pending appeal before IBLA (see Murray Perkins, 116 IBLA 288, 297 (1990)) was not violated here because the rejection of Appellant's lease offer, the subject of the appeal, was not changed, but only the legal basis for granting the lease. (Answer at 3.)

Further, BLM argues, regardless of whether lease CACA 36529 was issued under the wrong authority, BLM's decision to partially reject Enron's oil and gas lease offer CACA 37439 was correct because "[l]and included in an outstanding oil and gas lease is not available for leasing regardless of whether that lease is void, voidable or valid." (Answer at 4, quoting Irwin Wall, 69 IBLA 321, 322 (1982).)

[1] As an initial matter, to the extent that Enron's offer to lease CACA 37439 embraced lands which were, at the time of the offer, subject to an outstanding CRA, it is clear that Enron's offer was correctly rejected. Land included within an outstanding oil or gas lease is not available for leasing, and an application for such land must be rejected. This is true whether the lease or other instrument, such as the CRA here, is valid, void, or voidable. Irwin Wall, 69 IBLA 321, 322 (1982); George E. Conley, 1 IBLA 227, 229 (1971). Thus, regardless of any question as to the correctness of the issuance of CRA CACA 36529, Enron's offer to lease was properly rejected to the extent that it embraced any land subject to the CRA.

While this resolves the instant appeal, we deem it necessary to briefly address some of the ancillary issues presented by this case. There is absolutely no question, and BLM now admits it before the Board, that issuance of the CRA under the authority of the Right-of-Way Leasing Act was improper. Indeed, since it is clear that the Right-of-Way Leasing Act did not apply to the subject lands, inclusion of those lands within the CRA rendered the agreement void as a matter of law, since BLM's actions violated a statutory, rather than a mere regulatory proscription. See, e.g., William L. Ahls, 85 IBLA 66 (1985); Champlin Petroleum Co., 68 IBLA 142, 89 I.D. 561 (1982); United States v. Alexander, 41 IBLA 1 (1979), aff'd, Alexander v. Andrus, No. 79-603-B (D.N.M. July 7, 1980); Nola Grace Ptasynski, 28 IBLA 256 (1976), aff'd, Ptasynski v. Hathaway, No. 75-282-M (D.N.M. May 5, 1977). Under our past precedents, it is clear that the proper course of action would be cancellation of the subject agreement, either by administrative or judicial proceedings. See generally Lee Oil Properties, Inc., 85 IBLA 287 (1985).

However, we note that, with respect to the present appeal, Tonka has made considerable expenditures in obtaining production attributable to the area covered by the compensatory agreement and tendered royalties thereon, presumably in reliance upon the compensatory agreement. These facts raise

elements of estoppel that were not present in our prior cases. Moreover, Tonka has not been made a party to this proceeding and, thus, has not had an opportunity to address these various issues. We deem it appropriate, therefore, to remand the matter to BLM and direct that BLM, with the assistance of the Office of the Solicitor, examine the subsisting factual circumstances and make an initial determination as to whether the test for estoppel, as delineated in our prior decisions (see, e.g., Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd, Ptarmigan, Inc. v. United States, Civ. No. A88-467 (D. Alaska Mar. 30, 1990), aff'd, Ptarmigan, Inc. v. United States, No. 90-35369 (9th Cir. May 15, 1991)), has been met. Tonka, of course, may appeal from any BLM decision should it be adverse to its interests.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed, and the case files are remanded for further consideration as delineated above.

James P. Terry
Administrative Judge

I concur:

James L. Burski
Administrative Judge

